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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

WAVE NEUROSCIENCE, INC.,
a Delaware corporation,

Plaintiff,

vs.

PEAKLOGIC, INC., a Delaware
corporation; and KEVIN T. MURPHY,
M.D., a Professional Corporation, doing
business as MINDSET

Defendants.

U.S.D.C Northern District of California
Case No.

U.S.D.C. Southern District of California
Case No. 3:21-cv-01330-CAB-SBC

**PLAINTIFF WAVE
NEUROSCIENCE, INC.'S NOTICE
OF MOTION AND MOTION TO
COMPEL COMPLIANCE WITH
OUT OF DISTRICT SUBPOENA TO
THIRD PARTY KARMA TMS, P.C.**

Hearing:

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

Plaintiff Wave Neuroscience, Inc. (“Wave”), by and through its undersigned counsel, at the Courts earliest availability, will and hereby does move this Court for an entry of an order compelling Karma TMS, P.C. (“Karma”) to produce documents in response to a non-party subpoena duces tecum pursuant to Rule 45 of the Federal Rules of Civil Procedure. As indicated in the caption, the case in which the subpoena was issued is proceeding in the United States District Court for the Southern District of California (Case No. 3:21-cv-01330-CAB-SBC) before the Honorable Cathy Ann Bencivengo. Because I.E. TMS is located in this District, the motion to compel is properly heard here, the situs of production. *See* Fed. R. Civ. P. 37(a)(2) (“A motion for an order to a nonparty must be made in the court where the discovery is or will be taken); *see also* Fed. R. Civ. P. 45(d)(2)(B)(i) (“At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.”).

This Motion is based upon this Notice and Motion, the accompanying Memorandum of Points and Authorities, and the concurrently filed Separate Statement of Disputed Discovery, Declaration of Deborah S. Mallgrave, Request for Judicial Notice, and Proposed Order, and such other and further argument as may be presented to the Court at the time of the hearing on this Motion.

DATED: July 12, 2024

BUCHALTER
A Professional Corporation

By: /s/ Deborah S. Mallgrave
J. Rick Taché
Deborah S. Mallgrave
Attorneys for Plaintiff
Wave Neuroscience, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Karma has refused to comply with a properly served subpoena, asserting numerous objections that lack merit and fail to justify its refusal to produce *any* relevant documents. Through meet and confer efforts, Wave has offered to narrow the scope of the documents and requested specifics on Karma's burden claims, but to no avail. Notably, of the 20 narrowly tailored categories of documents sought by the subpoena, Karma objects to the relevance of only 3 (and even those categories seek documents that are clearly relevant). Wave is thus forced to seek this Court's intervention to compel Karma's compliance and the production of documents unquestionably relevant to the underling action.

Wave is a leader in developing non-invasive technology targeted to addressing neurological disorders and enhancing cognitive brain function through Transcranial Magnetic Stimulation ("TMS"). Wave has an extensive patent portfolio directed to analyzing a patient's electroencephalogram ("EEG") results to derive insight into brain health that is then used to create an actionable cognitive treatment report.

Wave brought the underlying action for infringement of three of its patents by defendants PeakLogic, Inc. ("PeakLogic") and Kevin T. Murphy, M.D., a Professional Corporation ("KTM") (collectively, "Defendants"): U.S. Patent Nos. 8,475,354, 8,480,554, and 9,446,259 ("Asserted Patents"). (Declaration of Deborah S. Mallgrave ("Mallgrave Dec."), Ex. A (Second Amended Complaint); Request for Judicial Notice ("RFJN"), Ex. 1.) The Asserted Patents are directed to methods, systems, and/or devices that gently tune the brain using a magnetic field to influence, among possible options, an intrinsic frequency of a specified EEG band of the subject toward a pre-selected intrinsic frequency of the specified EEG band, for treatment of a number of mental disorders (for example, depression and PTSD). *Id.*

Kevin Murphy, M.D. founded PeakLogic, Inc., a medical software company, as well as his self-titled corporation, KTM, which operates as a separate treatment

center (for a time, operating as MindSet). PeakLogic (through Dr. Murphy) claims to have invented and developed software for a personalized approach to TMS treatment by tailoring it to the patient's unique brain mapping, referred to as PrTMS, and now licenses that technology and system to KTM and other licensees. KTM also provides doctor-to-doctor medical consulting services to PeakLogic's other licensees and physicians who would like to use PrTMS. Karma is one such licensee of PeakLogic's products and services.

As alleged in Wave's complaint, Defendants' products and services use the same methodology claimed by the Asserted Patents. Defendants not only use and sell infringing products and services, but intentionally promote, aid, and instruct others, including PeakLogic's licensees (like Karma), to purchase and use the allegedly infringing products and services, thereby inducing and contributing to infringement by others. Wave thus sued Defendants for both direct and indirect infringement.

For their part, Defendants filed counterclaims against Wave, alleging among others, claims for defamation, tortious interference with contract, tortious interference with prospective economic advantage, and negligent interference with prospective economic advantage (collectively, the "Tort Claims"). (Mallgrave Dec., ¶ 4, Ex. B (Defendants' Answer, Affirmative Defenses, and Counterclaims I-XII to Plaintiff's Second Amended Complaint) at ¶¶ 23–27 and 76-101; RFJN, Ex. 2.) Defendants' Tort Claims are each premised on the same allegations that Wave made defamatory statements to PeakLogic's licensees that Defendants infringed Wave's patents. *Id.* at ¶¶ 23-27. As damages, Defendants claim the alleged defamatory statements have forced them to lose over \$9,000,000 from discounted license fees, the loss of existing and potential licensees, and the loss of certain investment funds. (Mallgrave Dec. at ¶ 5, Ex. C.)

As part of its discovery, Wave propounded written discovery to Defendants to ascertain facts and information relating to infringement and the Tort Claims. *Id.* at ¶ 6. Through multiple sets of discovery and discovery disputes, however, Defendants

1 maintain that they do not have certain information relating to Wave's claims for
 2 induced or contributory infringement, namely, information relating to the licensees'
 3 use or implementation of Defendants' treatment protocols. Defendants also maintain
 4 that they do not have any documents evidencing the alleged defamatory statements
 5 for their Tort Claims, and that any such documents would be in the possession of
 6 third parties. *Id.* at ¶¶ 6-7. As a result, Wave issued subpoenas to PeakLogic's
 7 licensees, including Karma, to obtain necessary information relating to receipt and
 8 implementation of treatment plans from Defendants and documents relating to
 9 Defendants' Tort Claims. *Id.* at ¶ 8, Ex. D.

10 The categories of documents Wave seeks from Karma include
 11 communications and documents concerning Wave, the underlying action, the Tort
 12 Claims, and the Asserted Patents; agreements with Defendants; training materials
 13 from Defendants; advertising materials; the TMS treatment plans and related
 14 documents for 5 patients; and certain statistical or summary records relating to use
 15 of Defendants' products and services. *Id.* The document requests in the subpoena are
 16 narrowly tailored to obtain only relevant information, and specifically exclude
 17 specific patient information. To the extent responsive documents contain any
 18 confidential information, Karma can designate the information as confidential
 19 pursuant to the operative protective order in the underlying case, which was provided
 20 to its counsel. *Id.* at ¶ 14; RJN Ex. 3.

21 Despite meet and confer efforts, Karma stands on its objections that (1) some
 22 of the requested documents are obtainable from Defendants, (2) the time period for
 23 some requests is overly broad, (3) information relating to the Tort Claims is not
 24 relevant, (4) the request for marketing materials seeks publicly available information,
 25 (5) certain requests seeks private medical information, (6) the subpoena attempts to
 26 evade a court order limiting discovery, and (7) discovery is improper while a
 27 summary judgment motion is pending. *Id.* at ¶¶ 13 and 18, Exs. F and J.

As explained in more detail below, Karma's objections lack merit. Wave respectfully requests this Court compel Karma to comply with the properly served subpoena and produce responsive documents by August 9, 2024.

II. ARGUMENT

A. Legal Standard

The purpose of discovery as allowed by the Federal Rules of Civil Procedure is to provide the parties with a panoply of devices that serve "to narrow and clarify the basic issues between the parties" and to "ascertain[] the facts, or information as to the existence or whereabouts of facts, relative to those issues." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

Under Rule 26 of the Federal Rules of Civil Procedure, a party may obtain discovery concerning any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Relevancy for purposes of discovery is defined "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on" any issue in the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). For discovery purposes, relevance means only that the materials sought are reasonably calculated to lead to the discovery of admissible evidence. *Id.* "If a subpoena falls outside the scope of permissible discovery, the Court has authority to quash or modify it upon a timely motion by the party served ..." *Olde Towne Dev. Group, LLC*, 2009 WL 2021723, *1 (M.D.La. July 9, 2009). Relevant information need not be admissible to be discoverable. FED. R. CIV. P. 26(b)(1).

Rule 45 of the Federal Rules of Civil Procedure governs subpoenas duces tecum for the production of documents from non-parties with or without the taking of a deposition. Rule 45 serves "to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties ..." Fed. R. Civ. P. 45, Advisory Committee Notes to 1991 Amendment. "The non-party witness is subject to the same scope of discovery under

1 this rule as that person would be as a party to whom a request is addressed pursuant
2 to Rule 34.” *Id.*

3 The recipient of a subpoena is required to exercise due diligence to make a
4 reasonable inquiry for responsive records. *Sol v. Whiting*, No. CV-10-01061-PHX-
5 SRB, 2014 WL 12519787, at *3 (D. Ariz. Sept. 9, 2014) (citing *Rogers v. Giurbino*,
6 288 F.R.D. 469, 485 (S.D. Cal. 2012)). “If no responsive documents exist, ‘the
7 responding party should so state with sufficient specificity to allow the Court to
8 determine whether the party made a reasonable inquiry and exercised due
9 diligence.’” *Id.* (citing *Marti v. Baires*, No. 1:08-CV-00653-AWI, 2012 WL
10 2029720, at *19 (E.D. Cal. June 5, 2012)). When a non-party objects to a subpoena
11 as being unduly burdensome, the non-party “has the burden of establishing that claim
12 by showing ‘the manner and extent of the burden and the injurious consequences of
13 insisting upon compliance with the subpoena.’” *Lo v. Fed. Nat. Mortg. Ass’n*, No.
14 2:12-CV-01411-GMN, 2013 WL 2558614, at *4 (D. Nev. June 10, 2013) (citing
15 *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966); 9A Charles Alan
16 Wright et al., *Federal Practice and Procedure* § 2463.1 (3d ed. 2013)).

17 When timely objections are served, the party that served the subpoena may
18 move for an order compelling production or inspections. Fed. R. Civ. P. 45(d)(2)(B).
19 “A motion for an order to a nonparty must be made in the court where the discovery
20 is or will be taken.” Fed. R. Civ. P. 37(a)(2). In addition, a non-party withholding
21 subpoenaed information based on privilege must: (1) expressly make the claim of
22 privilege; and (2) “describe the nature of the withheld documents, communications,
23 or tangible things in a manner that, without revealing information itself privileged or
24 protected, will enable the parties to assess the claim.” Fed. R. Civ. P. 45(e)(2).

25 **B. The Subject Subpoena and Karma’s Response to Date**

26 Wave served Karma with a Subpoena to Produce Documents, Information, or
27 Objects or to Permit Inspection of Premises in a Civil Action (the “Subpoena”).
28 (Mallgrave Dec. at ¶¶ 11 - 12, Exs. D and E.) The Subpoena commands the

production of documents responsive to twenty (20) separate, narrow, and specific requests from a time period relevant for the litigation. *Id.* Karma, through its counsel's April 24, 2024 letter, delivered cursory written objections to the subpoena issued by Wave and expressed concern about the potential burden caused by the scope of the requests. *Id.* at ¶ 13, Ex. F. The parties met and conferred, and through that process, Wave significantly narrowed or offered to narrow the scope of documents requested for the category it perceived Karma expressed would cause the largest expenditure of time and money. *Id.* at ¶¶ 14, 15, and 17, Exs. G, H, and I.

The document requests described in the subpoena and Karma's objections follow:

Subpoena Request	Karma's Objections ¹
RFP 1: All Communications from January 1, 2019 to the present with PeakLogic, Kevin T. Murphy, M.D., or MindSet comprising, discussing, relating to, or regarding Wave, Fred Walke, this Action, or the Asserted Patents.	<ul style="list-style-type: none"> - Seeks material that should be available to or in the possession of Wave or Defendants - Unreasonably long period of time covered.
RFP 2: All notes, emails, memoranda or other Documents discussing, referencing, or memorializing any Communications from January 1, 2019 to the present with PeakLogic, Kevin T. Murphy, M.D., or MindSet comprising, discussing, relating to, or regarding Wave, Fred Walke, this Action, or the Asserted Patents.	<ul style="list-style-type: none"> - Unreasonably long period of time covered; - Seeks internal business, logistics, or similar information having no bearing on the underlying action.
RFP 3: All Communications from January 1, 2019 to the present with Wave, or anyone purporting to act on its behalf, in which Wave (or the person purporting to act on its behalf) made statements to You that (i) if You worked with Defendants, You will get sued; (ii) that Defendants stole technology from Plaintiff, (iii) that Plaintiff is suing Defendants, (iv) that Defendants are going out of business, (v) disparaged Defendants, or (vi) convinced You not to do business with Defendants.	<ul style="list-style-type: none"> - Seeks material that should be available to or in the possession of Wave or Defendants - Unreasonably long period of time covered.
RFP 4: All notes, emails, memoranda or other	- Unreasonably long period of

¹ Karma's objections to the Document Requests are derived from its counsel's letter dated April 24, 2024. (Mallgrave Dec. at ¶ 13, Ex. F.)

1	Subpoena Request	Karma's Objections¹
2		
3	Documents discussing, referencing, or	time covered;
4	memorializing any Communications from January	- Seeks internal business,
5	1, 2019 to the present with Wave, or anyone	logistics, or similar information
6	purporting to act on its behalf, in which Wave (or	having no bearing on the
7	the person purporting to act on its behalf) made	underlying action.
8	statements to You that (i) if You worked with	
9	Defendants, You will get sued; (ii) that Defendants	
10	stole technology from Plaintiff, (iii) that Plaintiff	
11	is suing Defendants, (iv) that Defendants are going	
12	out of business, (v) disparaged Defendants, or (vi)	
13	convinced You not to do business with	
14	Defendants.	
15	RFP 5: All agreements or drafts of agreements	- Seeks material that should be
16	between You, on the one hand, and PeakLogic,	available to or in the possession
17	Kevin T. Murphy, M.D., or MindSet, on the other	of Wave or Defendants;
18	hand, from January 1, 2019 to the present, relating	- Unreasonably long period of
19	to TMS therapy, this Action, or investment in	time covered.
20	PeakLogic, MindSet, Kevin T. Murphy, M.D, a	
21	professional corporation, or with Kevin T.	
22	Murphy, M.D.	
23	RFP 6: All Communications from January 1, 2019	- Seeks material that should be
24	to the present with PeakLogic, Kevin T. Murphy,	available to or in the possession
25	M.D., MindSet, or others, comprising, discussing,	of Wave or Defendants;
26	relating to, or regarding any agreements, potential	- Unreasonably long period of
27	agreements, or negotiations with PeakLogic,	time covered.
28	Kevin T. Murphy, M.D., or MindSet relating to	
	TMS therapy, this Action, or investment in	
	PeakLogic, MindSet, or with Kevin T. Murphy,	
	M.D.	
	RFP 7: All Communications from January 1, 2019	- Seeks material that should be
	to the present with PeakLogic, Kevin T. Murphy,	available to or in the possession
	M.D., MindSet, or others, constituting, discussing	of Wave or Defendants;
	or relating to any request to (i) modify any	- Unreasonably long period of
	agreements You had with Defendants, (ii) reduce	time covered.
	or discount the amount Defendants charged You	
	for any services, or (iii) reduce or discount any	
	amounts You allegedly owed Defendants.	
	RFP 8: All notes, emails, memoranda or other	- Seeks internal business,
	Documents or Communications discussing,	logistics, or similar information
	referencing, or memorializing the purpose or	having no bearing on the
	reason You sought to (i) modify any agreements	underlying action.
	You had with Defendants, (ii) reduce or discount	
	the amount Defendants charged You for any	
	services, or (iii) reduce or discount any amounts	
	You allegedly owed Defendants.	

1	Subpoena Request	Karma's Objections¹
2		
3	RFP 9: All training materials, manuals, presentations, memoranda, or other Documents from Defendants that provide general instructions on the Accused Service(s), how to input treatment protocols into TMS devices, or how to otherwise administer TMS treatment protocols.	- Seeks material that should be available to or in the possession of Wave or Defendants
4		
5		
6	RFP 10: Documents sufficient to show the number of TMS devices located at Your premises each year, from January 1, 2018, to the present.	-Unreasonably long period of time covered;
7		- Seeks documents containing private medical information that is protected from disclosure or would require a laborious, expensive, and time intensive procedure to review and redact.
8		
9		
10		
11	RFP 11: Documents sufficient to show the number of treatments performed per TMS device per month from August 9, 2018 to the present.	-Unreasonably long period of time covered;
12		- Seeks documents containing private medical information that is protected from disclosure or would require a laborious, expensive, and time intensive procedure to review and redact.
13		
14		
15		
16	RFP 12: Documents sufficient to identify the standard forms received from Defendants, from August 9, 2018 to the present, for use in testing or treating patients.	- Seeks material that should be available to or in the possession of Wave or Defendants
17		- Unreasonably long period of time covered.
18		
19		
20	RFP 13: All Documents comprising or relating to the testing methodology received from Defendants for use pre-treatment, during treatment, and post-treatment in connection with TMS treatment or therapy.	- Seeks material that should be available to or in the possession of Wave or Defendants
21		
22		
23	RFP 14: All Documents comprising or relating to specifications of TMS devices in used in Your facility, including but not limited to all user guides and operation manuals for such devices.	- Seeks material that should be available to or in the possession of Wave or Defendants;
24		- Seeks documents containing private medical information that is protected from disclosure or would require a laborious, expensive, and time intensive procedure to review and redact.
25		
26		
27		
28		

1	Subpoena Request	Karma's Objections¹
2		
3	RFP 15: All Documents comprising or relating to	- Seeks material that should be
4	all payments made by You to PeakLogic, Kevin T.	available to or in the possession
5	Murphy, M.D., or MindSet from August 9, 2018	of Wave or Defendants;
	to the present.	- Unreasonably long period of
		time covered.
6	RFP 16: All advertising and marketing materials	- Seeks documents in the public
7	used by You to promote treatments using TMS	domain
	devices.	
8	RFP 17: Documents sufficient to identify all	- Seeks documents containing
9	treatment plans or treatment protocols You	private medical information
10	received from Defendants as related to TMS	that is protected from disclosure
11	therapy for 50 different patients (meaning, for each	or would require a laborious,
12	patient, all treatment plans or treatment protocols	expensive, and time intensive
13	applicable to that patient), the testing and other	procedure to review and redact;
14	information You provided Defendants or	- Calls for an unreasonable and
15	otherwise uploaded to the PeakLogic platform in	excessive number of patient
16	order to receive the treatment plans or protocols	records and information and
17	for those 50 patients, including EEG recordings	would require numerous
18	and patient questionnaires, data sufficient to	painstaking redactions on every
19	identify all treatment protocols or parameters	page of the relevant documents
20	programmed into a TMS device for the treatment	and records, exposing this
21	of those 50 patients, including the stimulation	laborious process to a high
22	history for each of those patients, any treatment	potential for human error.
23	reports available or generated for those 50 patients,	
24	and any notes concerning the implementation or	
25	modification of the treatment plans or protocols	
26	from Defendants. The information sought includes	
27	all information to identify all parameters of the	
28	Accused Services used in providing treatment to	
	the patient based on an EEG, including the	
	location, number of pulses, duration, and	
	frequency of the TMS or PrTMS therapy and, if	
	more than one frequency is applied, all frequencies	
	that were applied and in what order. This	
	information can be provided in a report or	
	summary form, and this request does not seek	
	specific identifying patient information and any	
	such information should be redacted from the	
	documents.	
	RFP 18: Documents sufficient to represent any	- Seeks material that should be
	reports You receive from Defendants that is	available to or in the possession
	related to the Accused Services. This request does	of Wave or Defendants;
	not seek specific identifying patient information	- Seeks documents containing
	and any such information should be redacted from	private medical information
	the documents.	that is protected from disclosure
		or would require a laborious,

Subpoena Request	Karma's Objections ¹
	expensive, and time intensive procedure to review and redact.
RFP 19: Documents sufficient to identify the conditions, impairments, or disorders of which the patients to whom you administer TMS therapy complained or had been diagnosed as of the time You began their TMS therapy. This request seeks statistical data and information in a summary form (for example, diagnostic codes) and does not seek specific identifying patient information and any such information should be redacted from the documents.	- Seeks documents containing private medical information that is protected from disclosure or would require a laborious, expensive, and time intensive procedure to review and redact.
RFP 20: Any treatment or research memoranda, reports, summaries, Communications, or other Documents sufficient to identify the outcomes or success of the TMS therapy You administered. This request seeks statistical data and information in a summary form, if possible, and does not seek specific identifying patient information and any such information should be redacted from the documents.	- Seeks documents containing private medical information that is protected from disclosure or would require a laborious, expensive, and time intensive procedure to review and redact.

C. Karma's Objections Lack Merit and Do Not Justify Its Failure to Produce Responsive Documents

A non-party served with a subpoena pursuant to Rule 45 must serve its objections "before the earlier of the time specified for compliance or within 14 days after the subpoena is served." Fed. R. Civ. P. 45(d)(2)(B). "A non-party's failure to timely make objections to a Rule 45 subpoena ... generally requires the court to find that any objections have been waived." *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636 (C.D. Cal. 2005) (internal citations omitted).)

As stated above, Karma has asserted six separate objections to the document requests. In addition, Karma has improperly posited Court orders from the Southern District of California limited Wave's document requests, and that as the result of a pending motion for summary judgement, the Subpoena should be stayed. Mallgrave Dec. at ¶¶ 13, 15, Exs. F, H. These are the only objections Karma has preserved. As

discussed in detail below, Karma's objections lack merit and do not stand as legal bases to prevent Wave from the relevant documents to which it is entitled.

1. The Information Sought is Not Available from the Parties in the Underlying Action

Karma objects to Request for Production Nos. 1, 3, 5-7, 9, 12-15, and 18 on the basis the materials sought *should* be available to or in the possession of either Wave or Defendants. *Id.* at ¶¶ 13 and 15, Exs. F and H. The presumption is false. Through the course of discovery, Wave has propounded three sets of Requests for Production to Defendants, and moved to compel further responses by Defendants to its first and second set of Requests for Production, respectively. *Id.* at ¶ 9. Defendants, through their Responses to Requests for Production, the Responses to the Motions to Compel, and at the hearings on those motions, have represented to Wave and the Magistrate Judge hearing the matter that they do not have the documents sought from Karma by the Subpoena. *Id.* at ¶ 6. To wit, Wave has informed Defendants that if they can produce the documents sought by the Subpoena, Wave would then withdraw those requests. Defendants have not done so. *Id.* at ¶ 8. Wave also has taken the deposition of PeakLogic's corporate representative and inquired further into its possession of the documents sought by the Subpoena. The testimony only confirmed that Wave can only obtain the documents it seeks from PeakLogic's licensed clinics. *Id.* at ¶ 16.

Further, that documents sought by subpoena are *believed* to be available through a party does not relieve Karma of its obligation to produce documents in response to the Subpoena. Assuming *arguendo* Defendants *had* produced responsive documents, Wave would still be entitled to issue a subpoena to a third party to verify those documents or determine if other responsive, relevant documents exist that are no longer in Defendants' possession, custody, or control. As an example, Defendants have represented they do not have copies of the different instructional or training materials, or different versions of the materials, they sent to their licensees.

1 While these materials may be something Defendants *should* have, they do not. Wave
2 must now obtain that information Defendants provided to Karma, from Karma.

3 2. The Time Period Covered by the Requests is Not Overly Broad

4 Karma objects to Request for Production Nos. 1-7 and 10-12 on the basis the
5 requests for documents going back to 2019 or 2018, respectively, are overly broad.
6 *Id.* at ¶ 13, Ex. F. Wave’s request for documents from 2019 or 2018 is not arbitrary—
7 it is the relevant time period for the litigation. 35 U.S.C. § 286. While the requests
8 cover a five or six-year time period, the scope of the requests are very narrowly
9 tailored and specific as to the type of information sought. For example, rather than
10 seek all communications with any of the parties for the six-year period, Request Nos.
11 1 and 3 seek only documents relating to specific statements, the specific patents at
12 issue, or the litigation. As another example, Request No. 10 seeks just the documents
13 sufficient to show the number of TMS devices located on Karma’s premises each
14 year.

15 However, it is not Wave’s intent to burden Karma with a tremendous cost or
16 expense in either time or money to produce the documents sought by the Subpoena.
17 In consideration of this concern, Wave invited Karma to discuss the parameters for
18 narrowing any particular request that was overly burdensome, so as to minimize the
19 burden. Karma chose instead to rely on its objection.

20 3. The Documents Requested Are Relevant to the Underlying
21 Litigation

22 Karma objects to Request Nos. 2, 4, and 8 as containing “internal business,
23 logistics, or similar information and thus have no bearing whatsoever on the
24 underlying patent infringement action.” *Id.* at ¶ 13, Ex. F. As identified in the chart
25 above, these requests seek documents relating to communications with Defendants
26 relating to Wave, this action, or the Asserted Patents (Requests Nos. 2 and 4) and any
27 discounts Karma may have received from Defendants (Request No. 8). As stated
28 herein, the underlying litigation is not strictly a patent infringement case,

1 but Defendants filed Tort Claims against Plaintiffs. The requested documents
 2 directly relate to those Tort Claims and the allegations that Wave made defamatory
 3 remarks to Defendants' licensees or that the alleged remarks forced Defendants to
 4 discount license fees or lose licensees. Defendants have also informed Plaintiff that
 5 they do not have any documentary evidence relating to the alleged defamatory
 6 remarks (nor does Wave). *Id.* at ¶ 7. To the extent Karma has any documents relating
 7 to Defendants' allegations, the documents are clearly relevant and Wave is entitled
 8 to the information. If responsive documents contain proprietary and confidential
 9 business information, Karma can designate the information as confidential pursuant
 10 the operative protective order in the underlying case.

11 4. The Requested Documents May Not Wholly Exist in the Public
 12 Domain

13 Karma objects to Request for Production No. 16 (related to marketing
 14 materials), on the basis that responsive documents are in the public domain. *Id.* at ¶
 15 13, Ex. F. Aside from Karma's website, Plaintiff is not aware of any advertising or
 16 marketing materials used by the subpoenaed parties to which Plaintiff has access, for
 17 example, to pamphlets, fliers, or other materials generated and shared with patients
 18 or potential patients. *Id.* at ¶ 14, Ex. G. Wave requested information related to any
 19 repository where the requested documents may exist, but Karma either could not or
 20 did not provide Wave with such information. *Id.* That its advertising materials might
 21 have once existed, or may still exist, in the public domain, is not conclusory on the
 22 issue of whether Wave has equal access. It does not, and Karma has not given any
 23 reason why responding to this request would be burdensome.

24 5. The Document Requests Do Not Seek Private Medical
 25 Information

26 Karma objects to Request for Production No. 10, 11, 14, and 17-20 (seeking
 27 documents relating to the licensee's implementation of TMS therapy) on the basis
 28 the documents contain private medical information that is protected from disclosure

1 or would require an expensive, and time-intensive review and redaction procedure.
 2 *Id.* at ¶ 13, Ex. F. First, the records sought are highly relevant. The patents at issue
 3 relate to methods and devices for administering transcranial magnetic stimulation
 4 (TMS) therapy. As stated in its Second Amended Complaint, Wave alleges that
 5 Defendants not only infringe the Asserted Patents, but induce its licensees, including
 6 Karma, to infringe the Asserted Patents as well. Thus, documents in Karma's
 7 possession relating to its relationship with Defendants and their use of Defendants'
 8 method for TMS are directly relevant to the underlying action.

9 Second, Wave does not seek any confidential or identifying patient
 10 information that is subject to HIPAA or other privacy laws. Indeed, some of the
 11 requests to which Karma objects, Requests Nos. 10, 11, 14, and 19-20, seek records
 12 that are not likely to contain patient identifying information and seek only
 13 information in summary or statistical form. Should any patient information exist in
 14 the documents to be produced, the operative protective order is also compliant with
 15 HIPAA confidentiality requirements. *See* 45 C.F.R. 164.512(e); RFJN, Ex. 3 at ¶¶ 10,
 16 31.

17 Lastly, while Wave initially sought records related to 50 patients, through the
 18 parties meet and confer efforts, and as a result of information more recently learned
 19 by Wave through discovery with Defendants, Wave agreed to further limit, as to
 20 Request No. 17, the number of treatment plans and related documents to just 5
 21 patients who completed a full treatment plan of at least 5 treatments, and their
 22 corresponding pre- and post-treatment EEGs. *Id.* at ¶ 7.

23 Any burden to Karma to produce documents for just 5 patients is significantly
 24 outweighed by Wave's need for records evidencing Defendants' licensee's use and
 25 implementation of treatment plans. The licensee's implementation goes directly to
 26 the issue of induced infringement, and the records are not obtainable through any
 27 other known source. Wave has subpoenaed several licensees for these records not
 28 only to obtain a representative sampling, but because they are needed to support its

1 case.

2 6. The Southern District of California Did Not Limit Wave's
 3 Document Requests

4 Karma's claim that the Subpoena is an attempt to side-step a court order is
 5 patently false. The Court in the underlying action has not directed Wave, as Karma
 6 claims, to limit or reduce its discovery requests on multiple occasions as excessive,
 7 nor has Wave been ordered not to seek the documents sought by the subpoenas.
 8 To the contrary, Wave has repeatedly sought the court's assistance to obtain
 9 Defendants' compliance with numerous discovery orders and their discovery
 10 obligations. *Id.* at ¶¶ 6 and 9.

11 The record actually reflects that the Court ordered Defendants to produce 100
 12 treatment protocols and related EEG files. When Wave sought successive and
 13 complete treatment plans, with the related EEGs, for the *same* patient (as opposed to
 14 100 random treatment plans), the court ordered Defendants to produce the treatment
 15 protocols and EEG files relating to 25 patients, and then subsequently ordered the
 16 production of 10 more, for a total of 35 different patient files. *Id.* at ¶ 9. At no time
 17 did the court make a finding that Wave was not entitled to additional treatment
 18 protocols that could be obtained from the subpoenaed parties (though Defendants did
 19 notify the court of Plaintiff's subpoenas and attempts to get the documents from
 20 Defendants' licensees). *Id.*

21 7. The Pending Motion for Summary Judgment is Not a Proper
 22 Basis to Withhold A Production of Documents

23 Karma's counsel's letter, dated May 17, 2024 posited non-party discovery
 24 should not proceed until the underlying Court ruled on Defendants' pending
 25 summary judgment motion. *Id.* at ¶ 15, Ex. H. Karma's reliance on *Camacho v.*
 26 *United States*, 2014 WL 12026059, at 3 (SD Cal. Aug. 15, 2014) for this proposition
 27 is misplaced. For starters, the underlying Court has not issued a stay of discovery
 28 while the summary judgment motion is pending, and no one (party or non-party,

1 including Karma) has sought a stay of discovery.

2 *Camacho* does not support a non-party's right to unilaterally withhold
3 documents while a summary judgment motion is pending. Rather, the court in
4 *Camacho* determined whether a stay of discovery was proper with such a motion
5 pending, applying a two-part test. *Camacho*, 2014 WL 12026059, at *6. Step one
6 requires that the pending motion must be potentially dispositive of the entire case, or
7 at least dispositive on the issue at which discovery is aimed, and step two requires a
8 finding, by the court, that a clear possibility exists of granting the motion. *Id.*

9 First, applying the two-part test here, Defendants' pending summary judgment
10 motion is not potentially dispositive of the entire case, or on the issues to which
11 discovery is aimed. Wave filed its operative complaint alleging, in part, infringement
12 of three patents. (Mallgrave Dec., Ex. A.) Defendants filed Counterclaims related to
13 the allegations of patent infringement (e.g. declaratory judgment of noninfringement,
14 ineligibility and invalidity, and as to each patent, and immunity). *Id.* at Ex. B.
15 Defendants also filed counterclaims for defamation, tortious interference with
16 contract, tortious interference with prospective economic advantage, and negligent
17 interference with prospective economic advantage (the Tort Claims). *Id.* ¶¶ 76 – 101.
18 Defendants' Tort Claims are premised on allegations that agents of Wave, while
19 speaking to then existing or potential licensees of PeakLogic, told such licensees that
20 PeakLogic stole Wave's technology or infringed its patents. *Id.* at ¶¶ 23-27.
21 The discovery is thus relevant both to Wave's claims of patent infringement and its
22 defenses to Defendants' claims for declaratory relief and the Tort Claims.
23 Defendants' pending motion, even if granted, does not address the Tort Claims and
24 is not dispositive of the issues to which the discovery to the Karma is aimed.
25 Therefore, the first step of *Camacho* is not met, and Karma's reliance on same fails.

26 Second, the second step of the test requires a finding, *by the Court*, that a clear
27 possibility exists of granting the motion. As indicated by the volume of evidence
28 submitted with Wave's opposition to the motion (*see* RJN Ex. 5), numerous material

1 issues of disputed facts exist, such that a clear possibility of having the motion
 2 granted does not exist. Karma simply does not have any justification for unilaterally
 3 withholding documents based on Defendants' pending summary judgment motion.

4 Further to this point, during a hearing on one of Wave's motions to compel
 5 Defendants' production of documents, the Magistrate Judge addressed the very
 6 notion of withholding a production of documents on the basis of a pending summary
 7 judgment motion. The court there stated:

8 Defense withheld documents based upon waiting for an
 9 MSJ ruling, and that is of particular concern to the Court
 10 because the documents were relevant, or at least the
 11 relevance was not contested on that basis. And, therefore,
 12 the documents would otherwise have been produced.

13 Defense's position appeared to have been, throughout the
 14 case, that there were certain documents that may be
 15 relevant to the case, but they were being withheld because
 16 of the concern over costs and the burdensome nature of
 17 discovery should a dispositive motion be granted that
 18 would thereby allow the defense to be dismissed.

19 While I understand, of course, the position, concerns about
 20 the burdensome nature of discovery can be addressed in a
 21 number of ways, some of which, it appears, were explored
 22 here.

23 But there could have been, for example, a motion to stay
 24 discovery pending resolution of the MSJ. And such stays
 25 are often denied, I note, and that can delay or prolong
 26 discovery and create unnecessary litigation expenses and
 27 case management problems. However, that is an option.

28 I am deeply concerned by defendants' choice to withhold
 documents pending this ruling unilaterally. A party may
 not unilaterally decide to withhold information simply
 because they believe they may be later dismissed from the
 case.

(Mallgrave Dec. at ¶ 17.)

Karma never moved this, or any other court, for an order to quash, modify, or
 stay its obligation to produce documents in response to the Subpoena. Its unilateral
 decision to withhold the production of documents on this basis is unsupported by law
 and should not be permitted. Further, given the deadline to complete discovery in this
 case is on August 9, 2024, the parties can no longer wait for a ruling on the pending

1 summary judgment motions to obtain necessary discovery. Karma should be ordered
 2 to comply with its discovery obligations and produce the documents responsive to
 3 the subpoena.

4 **III. CONCLUSION**

5 In view of Karma's failure to comply with Wave's subpoena, and given the
 6 evidence sought is highly relevant to narrow and clarify the issues and to ascertain
 7 the facts, or information as to the existence or whereabouts of facts, relative to those
 8 issues presented in the underlying lawsuit, Wave respectfully requests that the Court
 9 compel Karma to produce all responsive documents by August 9, 2024.

10 DATED: July 12, 2024

BUCHALTER
 A Professional Corporation

12 By: /s/ Deborah S. Mallgrave
 13 J. Rick Taché
 14 Deborah S. Mallgrave
 Attorneys for Plaintiff
 Wave Neuroscience, Inc.